No. 07-222

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SUPREME COURT, U.S.

In The Supreme Court of the United States

RICHMOND NEWSPAPERS PROFESSIONAL ASSOCIATION,

Petitioner,

v.

MEDIA GENERAL OPERATIONS, INC., d/b/a RICHMOND TIMES-DISPATCH, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondent Media General Operations, Inc. d/b/a Richmond Times Dispatch, makes the following disclosures:

1. Media General Operations, Inc. is a publicly held corporation and it has parent corporations.

2. The parent corporations of Media General Operations, Inc. are Media General, Inc. and Media General Communications, Inc.

3. GAMCO Investors, Inc., a publicly traded company, owns 10% or more of the stock of Media General Operations, Inc.

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I. STATEMENT OF THE CASE

The Statement of the Case provided in the Petition for a Writ of Certiorari (the "Petition") filed by the Richmond Newspapers Professional Association (the "RNPA" or the "Union") actually constitutes a premature argument rather than an accurate account of the pertinent proceedings below. Accordingly, the Respondent, Media General Operations, Inc. d/b/a *Richmond Times-Dispatch* (the "Times-Dispatch" or the "Company") is compelled to submit its own brief Statement of the Case for this Court's review and consideration. Where appropriate, the Company also incorporates specific details of the proceedings in its argument in opposition to the Petition.

The case below arises from several unfair labor practice charges filed by the Union, which alleged that the Times-Dispatch engaged in actions that violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "Act"). (App. at A-5). However, only one of the three unfair labor practice charges filed by the Union is at issue in the Petition. In that charge, the Union alleged that the Times-Dispatch violated the Act when it refused "to provide financial information that the Union requested to substantiate an alleged statement of inability to pay" an annual "Christmas or holiday bonus" (the "Holiday Bonus") and subsequently discontinued its practice of paying the Holiday Bonus. (App. at A-7, A-27).

The General Counsel of the National Labor Relations Board (the "General Counsel") issued a Complaint on the Union's allegations, and the matter was tried before Administrative Law Judge, Bruce D. Rosenstein (the "ALJ"), on March 18, 19, and 20, 2002, in Richmond, Virginia. (App. at A-26).[1] For its part, the Times-Dispatch denied that it had violated the Act, and specifically maintained that the Company lawfully discontinued the Holiday Bonus. (App. at A-27). As to the Holiday Bonus issue, the ALJ rejected the RNPA's allegations and concluded that the Times-Dispatch did not violate the Act when it denied the Union's request for information or when it discontinued the Holiday Bonus. (App. at A-46). The ALJ specifically found that the Union waived its rights to bargain over the cessation of the Holiday Bonus because the Union conditioned such bargaining on the receipt of detailed financial information to which it was not entitled. (App. at A-47).

The General Counsel, the Union, and the Times-Dispatch filed exceptions to various aspects of the ALJ's decision with the Board.[2] (App. at A-15). In pertinent part, the exceptions submitted by the General Counsel and the Union challenged the ALJ's determination that the Company's actions with respect to the Holiday Bonus issue did not violate the Act. (App. at A-15, A-20). By Order dated

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[1] The National Labor Relations Board is referred to herein as the "NLRB" or the "Board."

[2] The Times-Dispatch's exceptions to the ALJ's decision, which were ultimately argued before the Court of Appeals, are not at issue before this Court.

December 16, 2005, the Board affirmed the ALJ's ruling on the Holiday Bonus charge, finding that Media General had not violated the Act by refusing to provide the Union with requested financial data or by subsequently discontinuing the Holiday Bonus. (App. at A-15 - A-17). As did the ALJ, the Board found that the Union had impermissibly conditioned bargaining over the Holiday Bonus issue on the receipt of information to which it was not entitled, and, in so doing, waived the Company's obligation to negotiate the matter further. (See App. at A-16 - A-17).

Both the Union and the Times-Dispatch filed petitions for review to the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals"), and the General Counsel applied to enforce the Board's Order. (App. at A-5). In pertinent part, the Union's petition for review challenged the Board's determination that the Company lawfully denied the RNPA's request for information and that the subsequent cancellation of the Holiday Bonus did not violate the Act. (App. at A-11). After a full briefing and oral argument, the Court of Appeals, inter alia, affirmed the Board's findings on the Holiday Bonus issue as reasonable and supported by substantial evidence in the record.[3] (App. at A-13). The Union petitioned the Court of Appeals for rehearing and rehearing en banc, and, on May 16, 2007, the Court of Appeals denied both requests. (App. at A-1 - A-2). On or about August

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[3] As discussed, infra, the crux of the instant Petition is the Union's incorrect assertion that the Court of Appeals did not base its holding on a conclusion that the Board Order was supported by substantial evidence.

14, 2007, the Union filed the instant Petition with this Court.

II. SUMMARY OF THE ARGUMENT

In its Petition, the Union seeks review of that portion of the Court of Appeals' decision enforcing the Board's Order on the Holiday Bonus issue. Specifically, the RNPA contends that in reaching its decision on this point, the Court of Appeals applied an incorrect standard of review. Contrary to the Union's assertions, however, the Court of Appeals explicitly announced and correctly applied the appropriate, well-settled legal standard to reach its conclusion and the RNPA's appeal to this Court is nothing more than a thinly-veiled attempt to reargue the record evidence.[4] While the RNPA nominally asserts that the Court of Appeals applied an incorrect standard of review, the Petition largely seeks an opportunity to challenge the Board and the Court of Appeals' interpretations of the record evidence. In any event, however, the Petition does not present any compelling circumstances that would warrant review by this Honorable Court.

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[4] The Union presents three questions for consideration by this Court, but in essence, there is only one issue presented by the RNPA on appeal, and that is whether the Court of Appeals applied the correct standard of review in considering the Board's opinion issued in this case. As discussed in greater detail below, the Union's arguments as to how the evidence was weighed by the Court of Appeals and how the evidence should be weighed by this Court are incapable of sustaining the Petition and should be summarily rejected.

Even a cursory review of the proceedings below readily demonstrates that the Court of Appeals grounded its decision in a proper application of controlling law. Indeed, the standard of review that the Union asserts the Court of Appeals ignored is expressly announced as controlling that court's consideration of the Board's Order. (App. A-13). Moreover, the specific authority upon which the Court of Appeals relied to support its holding with respect to the Holiday Bonus issue applied the very standard of review that the Union claims the decision below flouts. (App. at A-11). Finally, the Union's Petition also fails to the extent it collapses into an argument that that the Court of Appeals or the Board improperly weighed the record evidence in this case. Long-standing precedent and the rules of this Court make it clear that the evaluation of the evidence falls squarely within the province of the Courts of Appeals and will be reviewed in only the rarest of cases. Such rare circumstances are conspicuously absent from the instant case in which both the Court of Appeals and the Board were guided by a careful consideration of an extensive record and a proper application of the controlling legal standards. Thus, the Union's overriding request that this Court reexamine the evidence in this case should be flatly denied. For all these reasons, this Court should deny the RNPA's Petition as unwarranted.

III. ARGUMENT

A. Standard of Review Applicable on Petition for Writ of Certiorari.

Rule 10 of the Rules of the Supreme Court of the United States states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rather, writs of certiorari are granted only for compelling reasons, none of which are presented by the Union. Id. Because the appellate court's opinion clearly cited the applicable standard and since this Court, in evaluating Petitions for Writs of Certiorari addressing factual findings of the Board, limits its consideration to whether the Court of Appeals misapprehended or grossly misapplied the applicable standard of review, the Petition should be denied. American Textile Mans. Ins. v. Donovan, 452 U.S. 490, 523 (1981).

B. The Court of Appeals Applied the Proper Standard of Review.

The Act provides, in pertinent part, that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." 29 U.S.C. § 160(f) (2000). This Court has repeatedly acknowledged that this statutory standard compels a highly deferential judicial review of a Board order. See, e.g., Beth Israel Hosp. v. NLRB, 437 U.S. 483, 507-08 (1978) (noting that review of Board decisions by a court of appeals is

limited and reversal is only appropriate when the applicable legal standard has been "misapprehended or grossly misapplied"). An examination of the decision below confirms not only that the Court of Appeals properly understood the standard governing its review of the Board's Order, but also that it correctly applied that standard.

In reviewing the portion of the Board's Order relating to the Holiday Bonus issue, the Court of Appeals recited the familiar rules governing collective bargaining and, within that framework, examined the record evidence to determine whether it supported the Board's determination that the Times-Dispatch did not violate the Act. (App. at A-12 - A-13). The Court of Appeals took up the primary issue before the Board relating to the Holiday Bonus, which was whether the Times-Dispatch was legally obligated to respond to the Union's request for information tendered in response to the Company's proposal to discontinue the Holiday Bonus. As noted, supra, the Board concluded that the RNPA expressly and unjustifiably conditioned bargaining over the Company's proposal to discontinue the Holiday Bonus on the receipt of financial data that the Company was not legally obligated to provide. (App. at A-47). Consequently, the Board affirmed that the ALJ's finding that the Union "sat on its rights" when it failed to pursue bargaining, and the Times-Dispatch did not violate the Act when it discontinued the Holiday Bonus because the Union's deliberate, unjustified refusal to bargain waived the Company's obligation to negotiate further. (Id.). Thus, the lynch-pin of the Board's decision as to the Holiday Bonus charge was

that the Company was within its rights to deny the Union's request for information.

In its Opinion, the Court of Appeals specifically and unequivocally stated that "[s]ubstantial evidence thus supported the NLRB's conclusion that the Times Dispatch had no duty to disclose its financial information to the union." (App. at A-13). As this was the critical finding underlying the Board's Order as to the Holiday Bonus issue, this statement alone sufficiently demonstrates the fundamental flaws with the Union's instant position. There is still further evidence, however, of the Court of Appeals' understanding and proper application of the controlling standard of review. Specifically, at the outset of its analysis, the Court of Appeals expressly stated that it "would uphold the NLRB's findings of fact when supported by substantial evidence." (App. at A-9). Accordingly, it is manifest from the face of the opinion below that the Court of Appeals' consideration of the Board's Order was guided by the appropriate legal standard.

In addition to the express language of the Court of Appeals' opinion that refutes the Union's Petition, the precedent upon which the lower court specifically relied to support its holding on the Holiday Bonus issue undermines the Union's assertion that the decision below was grounded in an incorrect standard of review. Specifically, in support of its decision to enforce the Board's Order on the Holiday Bonus, the Court of Appeals cited American Postal Workers Union v. NLRB, 370 F.3d 25 (D.C. Cir. 2004), which in turn, relied upon Laborers' Local

Union 204 v. NLRB, 904 F.2d 715, 717 (D.C. Cir. 1990) and General Electric Co. v. NLRB, 117 F.3d 627, 638 (D.C. Cir. 1997). Read collectively, these cases demonstrate that when a court of appeals uses the term "rational" in reference to its decision to enforce the Board order, its ruling is predicated on the presence of substantial evidence to support the Board's findings. See, e.g., Local 204, 904 F.2d at 717 ("A reviewing court may not 'displace the Board's choice between two fairly conflicting views' and must defer to the NLRB's determination if the Board's conclusions are supported by substantial evidence on the record as a whole. . . . When the Board finds that its General Counsel has failed to establish a violation of the Act, this court credits that finding "unless it has no rational basis in the record.") (Ginsburg, J.). Accordingly, the soundness of the decision below is clear not just from the text of the Court of Appeals' opinion, but also from the precedent underpinning those words. (App. at A-11).

C. The Court of Appeals Properly Assessed the Rationality of the Board's Order.

As noted, supra, the bulk of the Union's Petition comprises a semantic attempt to misconstrue the Court of Appeals' sound, well-reasoned decision and thereby secure another opportunity to argue the facts of the case. Specifically, the Union seizes on a single phrase—"rational basis"—and urges this Court to make an astonishing inferential leap from these words to a conclusion that the Court of Appeals disregarded the controlling standard it expressly announced and

then "utilized an amorphous, non-statutory, malleable standard of review" to consider the Holiday Bonus issue. (Pet. at 4). The Union's argument in this regard is fanciful at best. It is simply not plausible that the Honorable Judges of the Court of Appeals chose to ignore the standard of review established by the Act—which the court cited in its opinion—and then substituted a new standard in its review of a single issue. By far, the more reasonable conclusion is that the statement was simply an expression of the Court of Appeals' opinion that substantial evidence rendered the Board's Order on the Holiday Bonus issue rational.

There is no basis in the case law to support the Union's contention that the use of the word "rational" inherently means that the Court of Appeals applied an incorrect standard of review. In fact, the cases upon which the RNPA relies actually undermine its position in the Petition. For example, this Court's decision in Beth Israel Hospital v. NLRB, a case cited in the Petition, effectively rejects the Union's instant assertion that the Court of Appeals must have applied an incorrect standard of review simply because it stated that the "NLRB . . . had a rational basis for dismissing" the RNPA's Holiday Bonus claims. (Pet. at 18-22; App. at A-13).

In Beth Israel, this Court addressed the application of the "substantial evidence" standard, and, relying on the narrow scope of judicial review of administrative decisions, stated: "The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the

rule, if supported by substantial evidence on the record as a whole, must be enforced." 437 U.S. at 501 (1978) (emphasis added). Ironically, then, the law of the land upon which the RNPA relies speaks in the very language that the Union contends automatically renders the Court of Appeals' decision invalid. Notwithstanding the Union's apparent argument to the contrary, the Court of Appeals' statement that the Board's Order was rational does not ipso facto mean that the court applied the incorrect standard of review. Where, as here, the same decision that contains such a statement also cites and applies the appropriate standard, the argument that the reviewing court somehow misapplied the standard to one particular aspect of the case before it is utterly nonsensical. For this reason, too, the Petition fails to present a compelling question as would warrant this Court's review.

D. This Court Consistently Defers to the Courts of Appeals as to their Applications of the Substantial Evidence Standard of Review to Evaluate Administrative Decisions.

This Court has repeatedly recognized that review of Board decisions is a core function of the Courts of Appeals. Indeed, only in the rarest of cases will this Court intercede and alter a determination of a Court of Appeals with respect to a Board decision. As this Court has stated:

> Our power to review the correctness of application of the present standard ought seldom to be called into action.

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951). Moreover, a reviewing court may not "displace the Board's choice between two fairly conflicting views. . . ." Id. at 488. "The reviewing court must take into account contradictory evidence on the record . . . but the 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Donovan, 452 at 522-23 (quoting Consolo v. FMC, 383 U.S. 607, 620 (1966)).[5] Thus, only in cases where a petitioner is able to demonstrate that a Court of Appeals grossly misapplied the "substantial evidence" standard of review will this Court reconsider the lower court's findings. Absent such a showing on the part of a petitioner, this Court has established that decisions of the Court of Appeals as to the evaluation of the evidence will not be disturbed.

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[5] Interestingly, Universal Camera Corporation and Consolo were also cited by the Union in the Petition (Pet. at 19) despite the fact that the holdings of these cases severely undermine the Union's assertions that this Court should grant the Petition.

Notably, this Court in Consolo went to great lengths to explain how, in applying Section 160(f) of the Act, appellate courts are to refrain from combing the record to review a Board decision. In so doing, this Court showed why the Union's attempt to argue the weight of the evidence at this stage is misguided:

> Congress was very deliberate in adopting the [substantial evidence standard of review]. It frees the reviewing courts of the timeconsuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing court to substitute their discretion for that of the agency.

Id. at 620-21. In sum, this Court has consistently declined invitations to determine whether it would have found that a particular Board order was supported by substantial evidence. See Donovan,

452 U.S. at 523 (explaining that this Court does not conduct de novo review of record evidence when evaluating whether "substantial evidence" exists to support findings of the Board and the Courts of Appeals); Universal Camera Corp., 340 U.S. at 488 ("substantial evidence" standard does not mean that a reviewing court "may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been de novo."). Instead, this Court limits its consideration to the "findings and the record upon which they were based to decide whether the Court of Appeals 'misapprehended or grossly misapplied' the substantial evidence test." Donovan, 452 U.S. at 523.

It follows from the foregoing that the Union's extensive recitation of testimony in the record (Pet. at 9 through 15) is immaterial for purposes of determining whether the Petition should be granted. Similarly, the Union's arguments regarding past practices and the so-called "law of the shop," are likewise irrelevant to this Court's consideration of the Petition.[6] (Pet. at 17, 21). Rather, it is sufficient for the Court's instant consideration to note that the Court of Appeals concluded that the Board's decision was rational and, thus, supported by substantial evidence. (App. at A-13). In sum, this Court has consistently refused to weigh conflicting views of record evidence except in rare circumstances, such as where the lower court grossly misapplied the

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[6] In the same vein, the Union's references to an altogether separate case involving the Times-Dispatch and the Board, (Pet. at 8-9), are misplaced and should not be considered here.

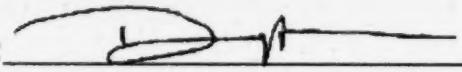
controlling standard of review. Donovan, 452 U.S. at 522-23; Beth Israel Hosp., 437 U.S. at 507-08; Consolo, 383 U.S. at 620; Universal Camera Corp., 340 U.S. at 488, 490-91. Because the Court of Appeals committed no such error in this case, this Court should reject the Union's attempt to argue the evidence one last time. Accordingly, the only remaining asserted basis for the Union's Petition fails to justify review by this Court.

IV. CONCLUSION

The Union's assertions that the Court of Appeals applied the incorrect legal standard in its review of the Board's Order on the Holiday Bonus issue is without support in the law or the record below. To the contrary, the Court of Appeals properly reviewed the record before the Board and determined that it substantially supported the Board's determination that the Times-Dispatch did not violate the Act when it discontinued the Holiday Bonus. Accordingly, the RNPA's Petition does not present any reason, much less a compelling reason, for this Court to review the Court of Appeals' ruling below. For the foregoing reasons, the Respondent, Media General Operations d/b/a the Richmond Times-Dispatch respectfully requests that this Court deny the Union's Petition for a Writ of Certiorari.

Respectfully submitted,

MEDIA GENERAL OPERATIONS, INC., d/b/a RICHMOND TIMES-DISPATCH

By: 

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